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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. RICHARD EDWARD HALL, Defendant and Appellant.	E031997 (Super.Ct.No. RIF 100497) OPINION

APPEAL from the Superior Court of Riverside County. Gary B. Tranbarger, Judge. Affirmed.

Terrence V. Scott, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, A. Natasha Cortina and Daniel Rogers, Deputy Attorneys General, for Plaintiff and Respondent.

1. Introduction

Defendant committed various offenses against J.H., his wife, and L.F., her

younger sister. The two cases were consolidated for trial. A jury convicted defendant of misdemeanor spousal battery,[1] making criminal threats,[2] and four counts of lewd and lascivious acts with a child under 14.[3] The court sentenced him to a total of seven years eight months in prison.

In considering defendant's contentions on appeal, we conclude: the amendment permitted mid-trial was not prejudicial; the purported prosecutorial misconduct was not prejudicial; and there was no prejudicial instructional error.

2. Facts

J.H. married defendant in 1999 when she was 16 years old and pregnant and defendant was over 18. J.H. dropped out of high school and the couple lived in a Rubidoux trailer park managed by defendant's mother. Their first daughter, Emily, was born in January 2000. After defendant's mother evicted J.H.'s parents, they and their 10-year-old daughter, L.F., J.H.'s sister, lived with J.H. and defendant during August 2000. J.H.'s parents slept in the living room of the two-bedroom trailer. Defendant and J.H. slept in one bedroom. The infant Emily slept in the second bedroom or with her parents.

During this time, L.F.'s father left for work at 6 a.m. Defendant went to work at 10 a.m. L.F. would play with baby Emily in the morning while J.H. was still asleep.

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[1] Penal Code section 243, subdivision (e)(1). All further statutory references are to the Penal Code.

[2] Section 422.

[3] Section 288, subdivision (a).

While L.F. was with Emily, defendant would come into the baby's bedroom. He sucked on L.F.'s breasts, touched her genitalia, and inserted his fingers in her vagina. He also forced her to put her hands and mouth on his penis and threatened her if she told anyone. She could not remember the exact dates of when the incidents occurred or how many times but she testified they occurred every weekday in August 2000. She eventually told two school friends about what had happened.

After J.H.'s parents and her sister moved out, defendant was aggressive, violent, and threatening toward J.H. At various times, he punched and slapped her, causing bruises. He kicked and dragged her. At Christmas in 2000, he hit and bruised her and threatened to kill her. He prevented her from seeing her family for a year. He would not allow her to visit the doctor alone.

In the spring of 2001, J.H. told her coworkers at the Dollar Tree about being abused but she did not call the police then. During this same period, while the abuse was ongoing, she wrote some loving, tender letters to defendant.

In July 2001, J.H. learned she was pregnant again. In October 2001, after defendant had beaten her badly and almost caused a miscarriage and again beaten and choked her unconscious, she finally contacted her parents. After her father came to get her, J.H. called the police from her parents' home.

A handwriting expert testified that, in journals kept by J.H., there were torn pages and some entries made by someone else, possibly Sarah L, defendant's brother's former

girlfriend. The latter entries purport to describe a scheme by J.H. to incriminate defendant. During the trial, Sarah L. left for Oklahoma and did not testify.

3. Amendment During Trial

As to L.F., defendant was originally charged with a single count of violating section 288.5, subdivision (a), substantial sexual conduct with a child under 14 for at least three months. At trial, the evidence showed L.F. lived with defendant for less than three months. Therefore, defendant moved to dismiss the section 288.5 charge. The People moved to amend the information. The court granted defendant's motion for acquittal but also granted the People's motion to amend, adding four counts for violating section 288, subdivision (a), committing lewd and lascivious acts against a child under 14.

Citing *People v. Pitts*,[4] defendant argues the mid-trial amendment violated due process, particularly because the preliminary hearing transcript provided inadequate notice of the specific acts against which defendant had to defend. *Pitts* involved an amendment to include acts not disclosed during the preliminary hearing.

At trial, L.F. described four types of sexual molestation perpetrated against her by defendant: oral contact with her breasts, digital penetration, touching of defendant's penis, and oral copulation of defendant's penis. In the preliminary hearing, the same offenses were described, except there was no specific mention of touching defendant's

[4] *People v. Pitts* (1990) 223 Cal.App.3d 606, 906.

penis. "Touching," however may reasonably be expected to have been involved as part of oral penile copulation.

Thus, *Pitts* is distinguishable. Here the basic conduct of which defendant was accused did not change between the preliminary hearing and the trial. Based on the pleadings, both before and after they were amended, and on the evidence adduced at the preliminary hearing, defendant knew he had to defend against having committed "three and more lewd and lascivious acts" against L.F. He received adequate notice of the charges against him.[5]

Nor are we convinced by defendant's argument that he was prejudiced by the amendment because his trial counsel would have conducted cross-examination differently. To the extent defendant claims defense counsel would have focused on specific dates and times, the record shows he did so quite rigorously even though the victim could not muster specific recollections. Additionally, it would not be a defense to show the victim could not recall specifically when the offense occurred. In order to support multiple violations of section 288, the victim only had to describe the general time period.[6]

Finally, we do not perceive there was a violation of section 288.5, subdivision (c). When the court dismissed the section 288.5 charge and allowed the addition of the

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[5] *People v. Gil* (1992) 3 Cal.App.4th 653, 658-659.

[6] *People v. Jones* (1990) 51 Cal.3d 294, 315-316.

section 288 charges, the pleadings in effect met the statutory requirement of section 288.5, subdivision (c), that other charged offenses be charged in the alternative.

Therefore, defendant suffered no prejudice and the trial court properly allowed the information to be amended during trial.[7]

4. Prosecutorial Misconduct

Defendant also urges both his convictions should be reversed because of prosecutorial misconduct. Specifically, the prosecutor asked defendant if he had been fired from a furniture store for stealing. Defendant denied it and the court sustained the defense's objection. Additionally, the prosecutor asked whether J.H. had found pornography in a drawer, which defendant also denied.

After the defense counsel objected, the prosecutor explained she did not supply advance discovery to the defense on these matters because she had received the information from J.H. at lunch on the day of trial. The court admonished the jury that questions and insinuations are not evidence.

Later, in denying the defense motion for new trial, the court ruled it was misconduct for the prosecution not to disclose the information to the defense but the prosecutor asked the questions in good faith and defendant was not prejudiced. We hold the trial court did not abuse its discretion in denying the new trial motion because it is not

[7] *People v. Winters* (1990) 221 Cal.App.3d 997, 1005.

reasonably probable defendant would have obtained a more favorable result absent the challenged conduct.[8]

Defendant characterizes the questioning involving pornography as inflammatory, comparing it with prejudicial evidence of other similar offenses.[9] The cases on which defendant relies are questionable, having been distinguished, disapproved, and overruled. Furthermore, the present situation did not involve evidence of other similar offenses under sections 288 or 288.5. Instead, it involved an accusation of theft and an unsubstantiated suggestion that "your wife found some pornographic magazines showing young girls in the drawer." Defendant denied the latter statement. Defense counsel objected and, after a recess, the court admonished the jury to ignore any insinuations. The prosecution did not present evidence of other theft or molestations committed by defendant. To the extent, the question about pornography implied defendant was interested sexually in underage girls, that implication was already established by the fact that defendant became sexually involved with J.H. when she was 15 or 16.

Even if the evidence of pornography and stealing was not admissible, the prosecutor's questions about those two subjects were isolated and tangential. More

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[8] *People v. Delgado* (1993) 5 Cal.4th 312, 328; *People v. Bryden* (1998) 63 Cal.App.4th 159, 182.

[9] *People v. Anthony* (1921) 185 Cal. 152; *People v. Asavis* (1937) 22 Cal.App.2d 492; *People v. Kelley* (1967) 66 Cal.2d 232; *People v. Thomas* (1978) 20 Cal.3d 457.

convincing evidence was provided by the victim, L.F., and the other schoolgirl witnesses in whom she confided. A better outcome for defendant was not reasonably probable.[10]

5. Instructional Error

Defendant asserts there were three kinds of instructional error.

a. CALJIC Nos. 4.71 and 4.71.5

First, as to the sexual offenses, he contends the court should not have given an instruction based on CALJIC No. 4.71 in addition to the proper instruction based on CALJIC No. 4.71.5.

The instruction based on CALJIC No. 4.71.5 states: "Defendant is accused in Counts Five through Eight of having committed the crime of Lewd Act with a Child, a violation of Section 288(a) of the Penal Code, *on or about* a period of time between August 1, 2000 and August 31, 2000. [Italics added.]"

The instruction based on CALJIC No. 4.71 states: "It is alleged in Counts One through Four that that the crime charged was committed '*on or about*' a certain date. If you find that the crime was committed, it is not necessary that the proof show that it was committed on that precise date; it is sufficient if the proof shows that the crime was committed on or about that date. [Italics added.]"

The jury asked about the meaning of the phrase "on or about" without specifying whether their question was directed at its use in either instruction. The court referred the

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[10] *People v. Smithey* (1999) 20 Cal.4th 936, 991.

jury to CALJIC No. 4.71 for a definition. Defendant's effort to argue the court committed prejudicial error in doing so is not convincing.

First, this issue has been waived on appeal because of defense counsel's express concurrence with the court's response to the jury's question.[11] Second, there is no error. No reason and no support appear in the record for defendant's contention that the jury misapplied CALJIC No. 4.71 to counts 5 through 8, the sexual offense charges governed by CALJIC No. 4.71.5. Furthermore, there is no inconsistency between the two instructions as to the meaning of "on or about." Defendant was charged with four sexual offenses occurring in August 2000. The evidence showed that a minimum of four offenses occurred during that month. As noted above, the precise date of each offense did not have to be established. It was enough to show the general time period in which the offenses occurred.[12] CALJIC No. 4.71 accurately explains the meaning of "on or about" whether used in CALJIC Nos. 4.71 or 4.71.5.

b. CALJIC No. 9.94

Defendant also claims the jury was wrongly instructed about count 4, the making of a criminal threat,[13] because the court did not define "immediate family" and did not

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[11] *People v. Boyette* (2002) 29 Cal.4th 381, 430.

[12] *People v. Jones, supra,* 51 Cal.3d at pages 315-316.

[13] Section 422.

include language that "any purported threat must reasonably appear to be a serious expression of the defendant's intention to inflict bodily harm."

It was not necessary to define immediate family because the subject threat was made against J.H. directly--not any member of her immediate family. Therefore, the jury did not need to consider whether defendant's threat caused her "reasonably to be in sustained fear for . . . her immediate family's safety."[14] The meaning of "immediate family" was irrelevant under the circumstances.

We also reject defendant's second contention concerning the instruction about criminal threats. The instruction, as given, properly tracks the language of section 422.[15] It also includes within its language the kind of meaning defendant asserts is required:

"Every person who willfully threatens to commit a crime which will result in death or great bodily injury to another person, with the specific intent that the statement . . . is to be taken as a threat, even if there is no intent of actually carrying it out, which threat, on its face and under the circumstances in which it is made, is so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat, and thereby causes that person reasonably to be in sustained fear for . . . her own safety . . . is guilty of a violation of Penal Code § 422, a crime. [¶] . . . [¶]

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[14] CALJIC No. 9.94.

[15] *People v. Solis* (2001) 90 Cal.App.4th 1002, 1014.

"The word 'immediate' means that degree of seriousness and imminence which is understood by the victim to be attached to the future prospect of the threat being carried out, should the conditions not be met.

"In order to prove this crime, each of the following elements must be proved:

"1. A person willfully threatened to commit a crime which if committed would result in death or great bodily injury to another person;

"2. The person who made the threat did so with the specific intent that the statement be taken as a threat;

"3. The threat was contained in a statement that was made verbally, in writing, or by means of an electronic communication device;

"4. The threatening statement on its face, and under the circumstances in which it was made, was so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat; and

"5. The threatening statement caused the person threatened reasonably to be in sustained fear [for . . . [her] own safety] . . .].

"It is immaterial whether the person who made the threat actually intended to carry it out."[16]

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[16] CALJIC No. 9.94.

The foregoing language both incorporates and exceeds any requirement that "any purported threat must reasonably appear to be a serious expression of the defendant's intention to inflict bodily harm."

c. CALJIC No. 1.00

Lastly, defendant complains the court erred by not giving CALJIC No. 1.00 at the conclusion of the case. But as the People demonstrate in great detail, the substance of CALJIC No. 1.00 was either self-evident or was communicated to the jury in many other instructions, when considered as a whole,[17] including CALJIC Nos. 0.50, 2.00, 2.02, 2.05, 2.11, 2.13, 2.20, 2.21.1, 2.21.2, 2.22, 2.27, 2.80, 2.81, 2.90, 17.30, 17.31, and 17.40. Any error in not giving CALJIC No. 1.00 was harmless.

6. Disposition

We affirm the judgment.

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s/Gaut
J.

We concur:

s/Ward
Acting P. J.

s/King
J.

[17] *People v. Kelly* (1992) 1 Cal.4th 495, 525.